IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-284

SUN SHIPBUILDING & DRY DOCK CO.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

JOHN J. RUNZER,
20th Floor,
The Fidelity Building,
Philadelphia, Pa. 19100
Attorney for Petitioner,
Sun Shipbuilding &
Dry Dock Co.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

INDEX (Continued).

TABLE OF CITATIONS.

IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1976.

—

No. .

—

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The petitioner, Sun Shipbuilding & Dry Dock Company, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Claims, granting summary judgment to the respondent and third party United States Lines, Inc. and dismissing Count II of the petitioner's First Amended Complaint, entered in this proceeding on May 28, 1976.

OPINION BELOW.

The Order of the Court of Claims, not yet reported, appears in the Appendix hereto.

JURISDICTION.

The Order of the Court of Claims was entered on May 28, 1976 and this petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1255(1).

QUESTION PRESENTED.

Did the Court of Claims significantly misapply the substantial evidence requirement of Section One of the Wunderlich Act, 41 U. S. C. § 321 in holding that the determination of the Department of Commerce, denying Sun Shipbuilding & Dry Dock Company full and adequate compensation for the additional costs incurred in carrying out changes ordered by the government and owner pursuant to a Maritime Administration subsidy contract, was supported by substantial evidence?

STATUTORY PROVISION INVOLVED.

Section One of the Wunderlich Act, 41 U. S. C. §§ 321; set forth in the Appendix to this Petition.

STATEMENT OF THE CASE.

A. Factual Background.

In July, 1962, the United States Lines ("USL") and the United States, through the Maritime Administration ("MarAd"), pursuant to the Ship Construction Subsidy Program, 46 U. S. C. §§ 1101, 1151-61, solicited bids for the construction of a flight of five cargo vessels. Sun Shipbuilding & Dry Dock Company ("Sun") was the low bidder and on October 10, 1962 entered into the contract with MarAd and USL for the construction of these five vessels. Under the terms of the contract, MarAd was to subsidize the cost to USL of the construction of these ships to the extent of 48.6%.

The contract provided that the five vessels were to be delivered as follows:

(1) Hull 628 on or before September 29, 1964;

(2) Hull 629 on or before December 13, 1964;

(3) Hull 630 on or before February 25, 1965;

(4) Hull 631 on or before May 12, 1965;

(5) Hull 632 on or before July 26, 1965.

However, Sun's low bid was predicated upon its ability to deliver the ships substantially before those dates. Thus, in November, 1962, shortly after the Contract was signed, Sun scheduled the first ship for delivery in July, 1964 with the succeeding ships to follow at 75-day intervals. This schedule was presented to MarAd and USL who did not dispute its reasonability (A229-30, A238-39).

Sun had the capacity and the ability to meet the accelerated schedule, and the shipyard embarked on a program designed to deliver the first ship in July, 1964.

Sun's November schedule called for the laying of the keel for the first ship in June, 1963. However, the first keel was actually laid on May 15, 1963, almost one month early (A134, A190). At about that time, however, USL and MarAd were actively considering a radical departure from the specifications of these five vessels, automating the ships' engine rooms (A126-27, A236).

Automating the engine room was a critical and technically difficult addition to the work required on these ships. In addition to being technically demanding, the change (which became known as Change Order 23) added a significant amount of work to the shipyard (A222-29, A245-50).

All parties recognized that the implementation of this change would seriously delay the delivery of these ships. Sun preliminarily estimated that delay at 60 days per ship (A134). Nonetheless, on May 31, 1963, MarAd and USL ordered Sun to perform the change. Sun immediately commenced a program to design, procure and ultimately install the sophisticated electronic components required to make Change 23 a reality. Of course, at that same time Sun continued to perform the unchanged work which was necessary to complete the ships (A223-28).

Throughout the summer of 1963, Sun's personnel continued to work diligently on these ships as required by the contract. However, on September 12, 1963, Sun was informed for the first time of the possibility that the quarters on these ships might be substantially revised (A136). Sun promptly protested this proposed quarters change indicating that it would significantly increase the cost of these vessels because much design and engineering work would have to be redone and this extra work should substantially delay the ships' delivery by about 90 days. Notwithstanding Sun's strong protestations, MarAd and

USL ordered Sun to perform the quarters change (Change Order No. 48) on October 1, 1963. Sun immediately began work on revising quarters in accordance with MarAd's and USL's directions in an attempt to minimize the delay. However, in February, 1964, USL and MarAd ordered still further revisions to the quarters even though Sun estimated that the supplemental revision would delay the ships an additional six to eight weeks each (A142).

The effect of these substantial changes was massive. They increased Sun's engineering workload over 20 percent by adding 50,000 engineering hours to the design task. In addition, the changes added almost 150,000 production hours, mostly in the work allocated to the Sun electrical department.

Despite these complex and significant changes, Sun performed the contract extremely expeditiously and actually delivered the ships as follows[1]:

Hull 629 on November 12, 1964;

Hull 628 on January 15, 1965;

Hull 630 on April 14, 1965;

Hull 631 on June 29, 1965;

Hull 632 on September 24, 1965.

This is an average of only 44 days later than the contract delivery dates. Following delivery of the last ship on September 24, 1965, Sun, in accordance with the requirements of the contract, submitted its final estimate of increased costs resulting from the issuance of Changes 23 and 48 and the delays caused thereby.

The tripartite contract required the shipbuilder to carry out any changes ordered by the owner or MarAd.

1. Hulls 628 and 629 were interchanged by agreement of the parties.

It further provided that the shipbuilder would be compensated for the cost of these changes as follows:

> "One hundred and ten per cent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or finally determined, shall be added to the contract price as an adjustment thereof."

B. Proceedings Below.

In an attempt to secure the compensation apparently assured by the Contract, Sun began working its way through a labyrinth of hearings and decisions. Sun submitted an original formal claim to the contracting officer in the amount of $5,218,516, plus a profit of ten percent or $5,740,368. On August 21, 1969 the contracting officer, having heard no testimony, concluded that $2,200,000 was the fair and reasonable value of the work.

The decision of the contracting officer was appealed to the Maritime Subsidy Board of the Department of Commerce which referred the case to its Chief Hearing Examiner to conduct a hearing and prepare a recommended decision. A hearing was held between December 1, 1969 and January 20, 1970, with counsel for Sun, USL and MarAd participating. In presenting its case, Sun demonstrated that the cost of the changes, including the contractually provided profit of 10%, was $6,688,893. After considering the matter for over four months, the Chief Hearing Examiner filed a Recommended Decision proposing that Sun receive $3,820,120 including profit (A120-214).

All three parties took exception to the Recommended Decision. Briefs and argument were submitted to the Maritime Subsidy Board. Purporting to review the Recommended Decision, but in effect, picking and choosing isolated bits of testimony, in a way not supported by the

record, the Maritime Subsidy Board reduced Sun's award to $2,798,882 (A31-114).

In January, 1972, the Secretary of Commerce reviewed the Board's award. Upon that review, the Secretary increased the amount to be recovered by Sun to $3,070,000 (A26-30).

Sun, believing that in certain respects neither the Recommended Decision, nor the decision of the Maritime Subsidy Board, nor the Secretary's final award was supported by substantial evidence, filed a petition in the Court of Claims.[2] Sun specifically identified three areas in which the compensation awarded by the Department of Commerce was not supported by substantial evidence. In each of these areas Sun had put forward substantial evidence of the costs associated with the changes. Neither the United States nor USL, joined as a third-party pursuant to Court of Claims Rule 41 (a), had put forward substantial evidence of its own. Rather each either merely attempted unsuccessfully to find gaps in Sun's proof or to present theoretical constructs which might explain their position. The three areas involved in the dispute were:

> 1. That the Department of Commerce, without substantial evidence, understated the number of days of delay caused by changes 23 and 48.
>
> 2. That the Department of Commerce's refusal to allow "hire-fire" costs which were properly attributed to the delay resulting from changes 23 and 48 was not supported by substantial evidence.

---

2. In Count I of its Final Amended Petition, Sun sought a judgment against the United States for breach of a provision of the contract which made the United States liable in the event the owner defaulted on progress payments. The Court of Claims denied Sun's motion for summary judgment on Count I and granted the motion of the United States for summary judgment. A petition for a writ of certiorari was denied. 419 U. S. 1021 (1974).

3. That in calculating "normal hull production rate" to determine the amount of continuing overhead caused by the delays arising from the changes, the Department of Commerce again acted in a way not based on substantial evidence.

It was Sun's position that, in each of these cases, Sun, alone, had produced substantial evidence to support the compensation it sought. It was Sun's further contention that the unsupported theories of USL and MarAd are not substantial evidence as that term is used in the Wunderlich Act.

The Court of Claims referred the matter to Senior Trial Judge Mastin C. White for a recommended decision. Judge White, in a recommended decision filed October 14, 1975 concluded that the decision of the Secretary of Commerce denying Sun "hire-fire" costs was not supported by substantial evidence. He, therefore, recommended that Sun be awarded these costs. The Trial Judge did, however, find that the decision of the Secretary of Commerce on two other points, including the number of days of delay caused by the changes, was supported by substantial evidence (A5-25).

All three parties requested that the Court of Claims review the recommended decision. In a two-page Order filed May 28, 1975, the Court of Claims affirmed the Trial Judge's recommended decision as it applied to the "days of delay" issue. Surprisingly, however, the Court reversed the recommended decision's determination that the Department of Commerce's position on "hire-fire" was not supported by substantial evidence (A2-4). Thus, the decision of the Secretary of Commerce, awarding Sun $3,070,000 was permitted to stand, in spite of the absence of substantial evidence supporting these main aspects of the award. The only recourse available to Sun is to petition this Court for a writ of certiorari. Unless such writ is granted, Sun will receive less than one-half of cost of the changes. And, such an unjust result will be based on a significant misapplication of the Wunderlich Act.

REASON FOR GRANTING THE WRIT.

The Court Below, in Affirming the Award of the Department of Commerce, Misapplied the Requirement of the Wunderlich Act That a Decision Be Supported by Substantial Evidence.

Sun performed expensive, disruptive and elaborate changes to these five vessels, as required by USL and MarAd. Sun, to date, has not been properly compensated for the cost of these changes. The determination by the Court of Claims that the Department of Commerce award was not unsupported by substantial evidence misconstrues that term as it is used in the Wunderlich Act. Sun believes that, by setting forth the evidence it produced to support two of its contentions, and contrasting that evidence to the submissions of MarAd and USL, this honorable Court will conclude that the determination by the Department of Commerce was not correct and that in affirming that determination, the Court of Claims seriously misconstrued the Wunderlich Act.

Section One of the Wunderlich Act, 41 U. S. C. § 321, provides:

> "No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fra[u]dulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

This Court, on several occasions, has addressed the "substantial evidence" requirement. In *United States v. Carlo Bianchi & Co., Inc.*, 373 U. S. 709 (1963), the Court stated:

> "The term 'substantial evidence' in particular has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court. This standard goes to the reasonableness of what the agency did *on the basis of the evidence before it.*" 373 U. S. at 715. [emphasis in original]

In *Universal Camara Corp. v. NLRB*, 340 U. S. 474 (1951) this Court analyzed, in some detail, the scope of review Congress contemplates when it employs the term "substantial evidence." This Court concluded:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . .
>
> . . . .
>
> Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." 340 U. S. at 488.

In ratifying the award of the Department of Commerce, the Court of Claims significantly misapplied that standard. Sun believes that a review of the evidence, in two areas, as presented to the Court of Claims, demonstrates that only

Sun presented substantial evidence to that Court. Sun further believes that, in view of the brief and unenlightening Order of the Court of Claim, such a presentation offers the most effective vehicle by which Sun can illustrate this misapplication of the substantial evidence standard.

a. The Only Substantial Evidence Before the Department of Commerce Demonstrated That Each Vessel Was Delayed 120 Days.

Had changes 23 and 48 not been required, Sun would have delivered the first vessel in mid-July, 1964, 75 days prior to the delivery date of September 29, 1964 established by the contract and 120 days prior to the actual November 12, 1964 delivery.

In the Court of Claims, it was recognized by all three parties that the total number of days between contract delivery dates for the five vessels and actual delivery dates—23 days—are delay days attributable solely to Changes 23 and 48 (A11-12). The dispute thus focused on the amount of delay *before* the contract delivery dates which was attributable to Changes 23 and 48. This issue arose because Sun established in the administrative proceedings that it clearly intended, prior to executing the contract, to deliver the vessels early, beginning in July 1964, rather than on the contract date for delivery of the first vessel September 29, 1964, and that meeting this July delivery date was crucial to Sun's estimate of costs upon which its low bid was based (A215-17).[3] Sun likewise established that it had notified the United States and USL that delivery of the first vessel was set for July 1964 and that it had the capability to meet this early delivery schedule (A215-17, A229-30, A230-31, A231-33, A238-39). The final administrative decision held that Sun would have delivered each of the five ships 15 days before the contract delivery dates set forth in the contract.[4]

In the Court of Claims, the United States supported the final administration determination of 15 days pre-contract delivery date delay per vessel. USL argued that the administrative decision was without basis in fact in finding *any* pre-contract delivery date delay. Sun argued that there is not substantial evidence to support only 15 days pre-contract delivery date delay per vessel. Thus, the issue before the Court of Claims was whether there was substantial evidence in the record to support the administrative finding that there was *only* 15 days pre-contract delivery delay per vessel (A10-12).

Any review of the record in this case in search for substantial evidence in support of the administrative finding of only 15 days pre-contract delivery date delay per vessel must start with the acknowledgement that the record contains overwhelming evidence to the effect that the changes added over 120 days of work per vessel to the job (or 75 pre-contract delivery date days). Sun produced four knowledgeable witnesses who each testified to this effect; Mr. Atkinson, the President of Sun, Mr. Maling, Sales Manager, New Ship Sales, Mr. Zeien, Vice-President of Engineering, and Mr. McNeal, Supervisor of the Electrical Engineering Department. Their testimony described in detail, the complex and time consuming tasks added by the changes and was uncontradicted (A215-17, A231-33, A234-36, A245-50).

Any evidence which would support the completely contrary conclusion that there was *only* 15 such delay days per vessel must be measured against this clear and un-

3. The parties have recognized that the follow-on ships would have been delivered at 75-day intervals, and the dispute thus revolves around the delivery date of the first ship if the changes had not been directed.

4. The Secretary of Commerce reinstated the Recommendation of the Hearing Examiner, who had actually heard the evidence. The Maritime Subsidy Board had disregarded the finding of the Hearing Examiner and found no pre-contract delivery date delay.

equivocal testimony that the changes caused 75 pre-contract delivery date delay days per vessel. The only direct testimony which has been cited in support of this contrary conclusion is that of Edward Scott Dillon, then Deputy Chief, Office of Ship Construction, Maritime Administration, who stated at one point in his testimony:

> I now feel that the first ship, hull 629, would have been delivered somewhere between 30 and 0 days prior to contract delivery date had it not been for changes 23 and 48 (A221).

When pressed as to what time period he would give if he "had to make the precise period," he stated:

> It is not possible to pick up the precise date under these circumstances, I would say 15 days prior to the delivery date (A221).

This is both the origin and the only direct support for the 15 days. Were this unequivocal testimony, uncontradicted by Mr. Dillon himself, and based on documentary evidence of record, it might be arguably sufficient to stand against the direct and uncontradicted testimony of the four Sun witnesses. However, this testimony, questionable at its inception, completely falls apart when examined in the context of Mr. Dillon's total testimony.

Twenty-six pages after the above-quoted passage, Mr. Dillon was confronted with a document which he wrote and which concluded that the changes added at least 75 days of work per vessel (or 30 days pre-contract delivery date delay). He admitted that this was his opinion when he wrote it and was still his opinion (A221-22). Thus, Dillon himself did not believe the 15 day figure which he had earlier settled upon. Such testimony was also inconsistent with other Dillon testimony that the addition of

about 7500 additional engineering hours resulting from an addendum involving a single plane engine added two weeks work to the delivery schedule of the first ship (A220-21). By this analysis, the addition of over 50,000 engineering hours required for Changes 23 and 48 would have itself caused over 100 days of delay per vessel (or 65 days pre-contract delivery date delay), without even taking into account the additional installation work.[5]

Although the United States relied upon Mr. Dillon's testimony, USL did not. But the most damning indictment of Mr. Dillon was by the Senior Trial Judge, who pointed out that Dillon testified as an expert on the basis of unidentified documents:

> . . . Mr. Dillon's opinion testimony, being based largely on undisclosed documents, could not, if standing alone, reasonably be regarded as "substantial" in the face of conflicting evidence from *Sun's witnesses who were in charge of the construction of the five ships and testified from personal knowledge of the fact involved in the construction program.* (A16) (Emphasis Added)

Up to this point, Sun would not take exception to the opinion of the Senior Trial Judge had it been adopted by the Court of Claims. However, the opinion goes on to add the Dillon testimony, which it has just recognized as insubstantial, to evidence of other delay factors cited in the USL brief and to conclude that, considering these two items of evidence together, a reasonable man *might* be convinced of the reasonableness of the 15 day conclusion reached

5. A simple analysis of the 50,000 engineering hours required for these changes independently confirms the realism of the clear and unequivocal testimony that the changes caused 120 additional days of work per vessel (or 75 pre-contract delivery date days). Sun had only 85 engineers available to work on this contract. If 60 percent of these engineers worked full time on the changes, it would take over 120 days for the engineering alone (A233).

in the administrative decision (A16-17). The opinion does not go on to analyze this other evidence, stating that "the court is not permitted in a Wunderlich Act case to weigh conflicting evidence on a disputed question of fact, once it has decided that the administrative determination is supported by evidence that can properly be regarded as substantial." (A17). Such a standard is not consistent with this Court's directives.

Sun has considerable difficulty with the failure of either the Senior Trial Judge or the Court of Claims to analyze and weigh the cited evidence of other delay factors, especially when the opinion seems to concede that neither the Dillon testimony nor these other factors, standing alone, would constitute substantial evidence and seems further to concede that the evidence from the Sun witnesses is unequivocal and clearly to the contrary. Two pieces of insubstantial evidence, added together, do not equal substantial evidence as required by the Wunderlich Act. It will be seen, as was intimated by the Senior Trial Judge, that the other evidence of delay factors cited by USL was clearly insubstantial and completely insufficient to support the final administrative determination that there was only 15 days of pre-contract delivery date delay per vessel.

The evidence of other delay factors must be viewed in proper perspective. There are really two questions involved. The first is as to how many additional days were needed for engineering and construction because of Changes 23 and 48. This is the issue to which the Sun witnesses and Mr. Dillon testified. As to this issue, the Senior Trial Judge found that there was no substantial evidence to support a figure as low as 60 days (15 pre-contract delivery date days) per vessel.

The second question views the problem indirectly. It assumes that the number of delay days has been determined and that, if the changes had not occurred, the vessels would have been delivered on a date determined by counting back from the actual delivery date the number of delay days. It then asks whether there were other, independent reasons why the new (theoretical) delivery dates could not have been met in any event.

As stated earlier in this Brief, the first USL vessel had a contract delivery date of September 29, 1964. Assuming that 75 days of pre-contract delivery date delay were caused by Changes 23 and 48, the assumed delivery date absent the changes would have been mid-July 1964. The question then is as to whether other delay factors would have, in any event, pushed that date back to September 14, 1964 (the 15 pre-contract delivery date delays allowed by the final administrative decision). These factors, listed in the Recommended Decision of the Hearing Examiner, whose opinion on this point was adopted by the Secretary of Commerce and which, therefore, became the decision that the Court of Claims had to establish was supported by substantial evidence, were:

(a) an addendum involving a single plane turbine engine;

(b) some alignment problems with an unconventional condenser arrangement;

(c) late engineering on the immediately preceding vessel, the Atlantic Heritage;

(d) 16 days of rain in April, 1964;

(e) diversion of manpower to repair work on the Cuyahoga (A201-02).

A review of the record demonstrates that these five factors, cited by the Hearing Examiner and by USL, taken individually or collectively, cannot push the assumed new delivery date back 60 days from mid-July 1964 to mid-September 1964, thus justifying the 15 days of pre-contract delivery date delay derived by the administrative decision.

Concerning the addendum to the engine, Mr. Zeien stated that, in his opinion, the addendum did not delay the delivery of these vessels at all (A250). Mr. Dillon testified that the addendum, if it delayed the vessels at all, delayed them at most two weeks (A221).

Regarding the alignment of the condenser, Mr. Snow, a USL witness, was unable, on cross-examination, to attribute any actual delay to this item. He admitted that, during the period alignment was going on, work was being done on both the quarters change and the automation change (A237). Surely miscellaneous testimony to the effect that "well we had trouble with this and we had trouble with that" without any attempt to quantify or to translate this into actual days of delay in delivery of the vessels cannot rise to the level of substantial evidence to chip away at clear evidence that the changes caused 120 days of delays on each vessel.

The evidence regarding the late engineering on the immediately preceding vessel, the Atlantic Heritage, was equally flimsy and was never tied down to any actual delay in delivery of the USL vessels. All that Mr. Snow, USL's witness, knew was that, as of March 1, 1963, the Atlantic Heritage engineering was behind schedule. He did not know how much it was behind schedule or even whether it was still behind schedule as of March 2, 1963 (A237-38). Of course, the relevant question was not whether some other vessel was behind schedule by an indefinite amount at one point in time but whether this fact had a direct impact on the USL vessels and the amount of that impact. Mr. McGowan, a MarAd witness, testified to this impact: "I don't concern myself with the Atlantic Heritage. I don't think it had a thing to do with it . . . ." (A233-34).

The ludicrous nature of the inclusion of 16 days of rain in April 1964 as a delay factor is highlighted by the

exchange between Sun and USL in briefs filed before the Senior Trial Judge. In its reply brief, Sun pointed out that even Mr. Young, USL's own witness, only attributed five days' delay, maximum, to heavy rain. USL replied:

> It is clear that the Examiner was simply cataloging the various non-change related delay facts at page 94 of the Recommended Decision when he referred to the 16 rain days in April, 1964 and was not, by that reference, deducting 16 days from SUN's early delivery claim.

Thus even USL admits the insignificance and lack of relevance of this line of disconnected and imprecise evidence.

The same deficiency infects the fifth cited delay factor —a short-term crane casualty. Mr. Young, a USL witness, testified that the USL hull being worked on when the casualty occurred (and he did not know the exact date of the occurrence) was not far enough along in construction at the time to require the continuous use of both cranes on the way in any event and that, as of the end of this month, all of the hulls were proceeding at a satisfactory rate (A241-45).

The final cited delay factor was diversion of manpower to repair work on the Cuyahoga. This work did not occur until the summer of 1964 (A218-20). By this time, absent the delay due to Changes 23 and 48, work on the USL vessels would not only have been substantially completed, but also the first hull would have been delivered! Moreover, the repair work done to the Cuyahoga primarily required the employment of steelworkers, and it was the steel work on the job that took longer than Sun had anticipated. But it was not steel work which was critical at this state of the USL job (even as it actually existed). The USL vessels were past this stage, and electrical work was the critical item for them. Thus the work

on the Cuyahoga did not delay the delivery of the USL vessels at all (A218-20).

It can thus be seen that, if the Court of Claims had undertaken a review of this purported evidence of other delay factors, it would have confirmed that this evidence, which was directed at a theoretical and indirect proposition to start with, never was connected up with the relevant issue—did these factors suffice to contradict the only substantial direct evidence as to the amount of delay caused by Changes 23 and 48, *i.e.*, 120 days per vessel? And, if so, how many delay days did each such factor account for? The "evidence" described above does not tie in at all to actual delay of the USL vessels, and it certainly does not quantify such delay, let alone to the extent of 60 days per vessel. When measured by the less demanding yardstick of relevance, this evidence fails.

We are, therefore, left with a situation where the insubstantial testimony of Mr. Dillon, when added to the insubstantial evidence of other delay factors, equals a record devoid of substantial evidence sufficient to support a final administrative finding of *only* 15 pre-contract delivery date delay days per vessel. This is not the substantial evidence required by the Wunderlich Act. In crediting the Department's position, the Court of Claims did not take into account the evidence of record which so totally undermined the Department's decision.

b. Similarly, the Decision of the Court of Claims Holding That the Denial of "Hire-Fire" Costs Is Supported by Substantial Evidence Demonstrates a Serious Misapplication of the Wunderlich Act Standard.

Massive changes, the size of Changes 23 and 48, severely delayed and disrupted the work force at the shipyard

(A222-28). Because of the delay caused by the changes, the first USL vessel was not launched on the scheduled date of February 28, 1964, but rather two and one-half months later on May 13, 1964 (A110, A228-29). If this first vessel had been ready for launch on February 28, 1964, outfitters could have been transferred to it from the last non-USL vessel, the ATLANTIC HERITAGE, which was delivered on December 17, 1963, since some outfitting work can be done prior to launch (A180). Because this vessel was not ready for launch until May, these men had to be laid off and either rehired later or new men hired to replace them. Through this hire-fire process, there was a loss of experience by these workers. Sun originally contended that changes 23 and 48 caused the layoff of 1241 men between August 1963 and May 1964. However, in briefing the point before the Chief Hearing Examiner, Sun reduced its claim to the layoff of 1130 men between September 1963 and February 1964 for a total cost of $435,000. The Hearing Examiner found that the effect of the changes was limited to 669 men at a cost of $236,222 (A178-81). The Board rejected this claim in its entirety and found, on the basis of the record created before the Hearing Examiner, that delay in the launching of the first USL vessel due to changes 23 and 48 was "insignificant." (A111). Sun challenged this finding in this Court but accepted for the purposes of appeal the Chief Hearing Examiner's limitation of causally related hire-fire costs to the three-month period of December 1963 to February 1964. The Trial Judge found that the Board's finding, affirmed by the Secretary of Commerce, which reversed the finding of the Chief Hearing Examiner, was not based on substantial evidence (A21-22). The Court of Claims, however, rejected the Trial Judge's conclusion (A2-4).

There is no dispute as to the fact that 669 men were laid off between December 1963 and February 1964, nor did the Board reject the Chief Examiner's finding that

these men would not have been laid off if the first USL vessel had been launched as scheduled on February 28, 1964. The only dispute before the Court of Claims was whether there was any evidentiary basis for the Board to reverse the Chief Examiner and to find that *no significant part* of the 75 days delay in launching the first USL vessel was caused by Changes 23 and 48. It will be seen that the conclusion that Changes 23 and 48 caused all of this delay is compelled by the overwhelming weight of the evidence as set forth in the preceding section and that any contrary conclusion is singularly lacking in evidentiary support.

The arguments of the Government and USL constitute attempts to pick away at bits and pieces of the evidence, utilizing rubrics having no application to the case at bar. It is asserted that Sun had the burden to prove the causal relationship between Changes 23 and 48 and the hire-fire costs. Sun accepted this burden and produced its chief officers, who testified, without qualification, that the outfitters were laid off because the USL vessels were not ready to receive them and that the USL vessels were not ready to receive them because of Changes 23 and 48 (A217-18, A228-30). No other witness testified that the USL vessels were not ready to receive the outfitters because of some other reason. Thus, having no evidence to create a dispute of fact, the Government and USL attempted to chip at this uncontradicted evidence. The Government and USL proceeded to attack the credibility of Messrs. Atkinson and Galloway. But did the Board attack or question the credibility of these witnesses? A review of its opinion will reveal that it did not. And it is only logical that the Board would not rest its reversal of the Chief Hearing Examiner on the credibility of witnesses who testified before the Examiner not the Board.

Next USL and the Government attempted to pick away at the Atkinson and Galloway testimony with the amorphous assertion that this was merely "opinion" testimony. In this regard, Mr. Galloway is criticized for not detailing the precise number of men who were laid off. A lack of knowledge as to such details certainly does not bring into question his qualification for testifying, as an officer of the company, as to the reason why it was necessary to lay-off a large number of men. The facts underlying this necessity were certainly something that the officers of the company examined in great detail. As Mr. Atkinson, Sun's President, testified:

> Well, layoffs are one of the unpleasant events that occur in shipyards and it is extremely unfortunate for the shipyard that layoffs of this kind did occur, particularly at the season of the year. It's awfully hard to explain to people that somebody had to change the quarters on a ship and their husband is going to be laid off before Christmas. This is a most difficult situation (A218).

To hold that these gentlemen were not qualified to testify as to why these layoffs occurred or that their testimony was conclusory or summary, as the Court of Claims did (A3), because they were not knowledgeable as to the exact number of men laid off, how long they were laid off, etc., was baseless.

Finally, it must be pointed out that the testimony of Sun's officers was not in a vacuum. The whole focus of this case, of which hire-fire was only a minor part, was whether Changes 23 and 48 had delayed these vessels and by how much. Not only was the evidence that such delay had occurred overwhelming but also even the Board found that all of the delay between the contract delivery dates

and the actual delivery dates—232 days or approximately 46 days per vessel—were caused by Changes 23 and 48. So we are left with a situation where the very administrative decision under attack has found that each of these USL vessels was delayed 45 days by Changes 23 and 48. It is against this background that Messrs. Atkinson and Galloway testified that the first USL vessel was not ready to receive outfitters upon the delivery of the Atlantic Heritage because of Changes 23 and 48.

If the Board did not attack or discredit the uncontradicted evidence that the first USL vessel was not ready to receive outfitters because of Changes 23 and 48, what was the basis for its reversal of the Chief Hearing Examiner? The answer is that it pulled out of the record certain isolated evidence indicating undefined delays and some evidence not even indicating delay at all and attempted to relate that evidence to the delay in the launching of the first USL vessel. It then reasoned that *substantially all* of the delay from February 28, 1964 to May 13, 1964 was due to these other factors. It will be seen that the cited evidence simply cannot support such a conclusion. In fact, this reasoning was so strained that, as pointed out in the Opinion of the Trial Judge (A21), the Government and USL ignored it in their Briefs submitted to the Trial Judge.

The Board premised its evaluation of this other evidence by stating that "we are not persuaded that delay in that construction scheduled was caused by the changes rather than by events for which Sun was responsible." (A109-10).

The first such "event" cited by the Board was the interchange of Hulls 628 and 629, the first two USL vessels. As admitted by the Board, the interchange was for the purpose of speeding up construction by taking advantage of the larger crane facilities at the way where

Hull 629 was being constructed (A110). The Board then recites that, from the standpoint of cumulative man-hours per hull, Hull 629 surpassed Hull 628 "around" January 1964 and, "from certain other standpoints, such as percentage of erection completed, Hull 629 surpassed Hull 628 somewhat sooner in November 1963." From this point, the Board takes a huge inductive leap:

> It follows that it was several months thereafter from either standpoint before Hull 629 reached the vessel percentage completion that Hull 628 would have had but for the interchange of hulls (A110-111).

Although up to this point the Board had cited supporting evidence, no evidence is cited for this bold conclusion. How does the Board know where Hull 628 would have been had it remained first? On what basis does it assume that the interchange did not achieve its purpose of speeding up construction? On what basis does it conclude that it was "several months" after November 1963 before Hull 629 was where 628 would have been rather than one month, when outfitters were ready to transfer from the Atlantic Heritage? Finally, this decision to interchange was made *after* and in light of the changes ordered by USL and the Government. Obviously this switch would not have been ordered if it would have had the effect of pushing back a launch date and necessitating the layoff of hundreds of men. Yet, in the absence of any evidence to support its conclusion, the Board opined that this was "the principal cause of delay in the construction schedule plan for a February 1964 launch . . . ." (A111). Astoundingly, the Court of Claims adopted this flimsy logic.

As a throw-in, the Board also made reference to "certain other delay factors" which had previously been cited, mentioning "work resulting from the single engine ad-

dendum signed on February 25, 1963, and the lateness in preparation of plans for an Atlantic Refining tanker delaying engineering on the USL vessels." (A111).

Thus the Board picked out isolated facts and drew the unwarranted conclusion that they proved delay and the Court of Claims upgraded this to "substantial evidence." There was no evidence tying these items to delay in the launch of the first USL vessel. Neither these facts nor the inferences which the Board sought to draw from them were even used to cross-examine the witnesses who did testify as to what caused the delay in launch.

The most conclusive evidence of the lack of logic in the Board's approach is its complete lack of consistency with other aspects of the final administrative decision. As mentioned above, the final administrative holding was that delivery of each of the USL vessels was delayed by approximately 61 days by Changes 23 and 48. If any delay in the launch of the first vessel caused by these changes was "insignificant," this would mean that all 61 days of the delay in delivery due to the changes occurred after launch (A111). But this is inconsistent with the Board's finding elsewhere in its opinion that both pre-launch and post-launch work were affected by the delay (A81-82). This also would mean that there was a total of 136 days delay on the first USL vessel: 61 days due to Changes 23 and 48 (all after launch) and 75 days pre-launch delay due to other factors. Working back from the actual delivery date of November 12, 1964, this would mean that, but for the changes and the other cited factors, the first USL vessel would have been delivered in June 1964—even before Sun had scheduled its delivery!

In short, to conclude that the launching of the first USL vessel was 75 days late because Sun (knowing this effect would result?) interchanged the first two hulls in August 1963, in the absence of any testimony that this

interchange did have this effect, and on the sole basis that Hull 629 did not exceed Hull 628 in total manhours until "around" January 1964 is insupportable. When this is coupled with the clear evidence, on which much of the remainder of the administrative decision is based, that Changes 23 and 48 substantially delayed these vessels, including pre-launch delay, the finding is completely irrational. Again, in affirming the decision of the Department of Commerce, the Court of Claims has seriously misapplied the substantial evidence requirement.

CONCLUSION.

In three separate areas, Sun has been denied compensation for costs it necessarily incurred in carrying-out changes dictated by the United States and the United States Lines. Throughout the protracted proceedings, only Sun has proceeded substantial evidence demonstrating the cost of the change. Nonetheless, the Department of Commerce incorrectly denied Sun compensation. In the Court of Claims, this error was compounded. As the preceding discussion has illustrated, the Court of Claims, in affirming the decision of the Department of Commerce, seriously misconstrued the Wunderlich Act's substantial evidence requirement. Unless this matter is remanded to the Court of Claims to re-examine the evidence under more appropriate standards, Sun will be deprived of sums to which it is entitled, and the substantial evidence requirement of the Wunderlich Act will be reduced to a requirement that "some evidence be it contradicted or theoretical" will support an administrative determination.

Respectfully submitted,

JOHN J. RUNZER,
2001 The Fidelity Building,
Philadelphia, Pa. 19109
Attorney for Petitioner,
Sun Shipbuilding & Dry
Dock Company.